Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JAMES E. MACEWAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the jurisdictional provision of the statute prohibiting receipt of child pornography, 18 U.S.C. §2252A, requiring that the prohibited materials have "been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer" extend to materials that were received over a channel or instrumentality of interstate commerce, the Internet, without proof that the materials crossed a state or national boundary?

2) Does the imposition of a fifteen year mandatory sentence on an elderly and infirm addicted second offender possessor of child pornography required by 18 U.S.C. §2252A(b)(1) violate the Eighth Amendment prohibition on excessive penalties and cruel and unusual punishment, the Fifth Amendment requirement of due process and the doctrine of separation of powers?

PARTIES AND RULE 29.6 STATEMENT

All parties are listed in the caption. There are no corporate parties.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-27a) is reported at 445 F.3d 237. The opinion of the District Court (App., *infra*, 28a-33a) is unofficially reported at 2004 WL 3019316.

JURISDICTION

The Court of Appeals' judgment was entered on April 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 34a-35a.

STATEMENT OF THE CASE

This case addresses whether an individual may be convicted of possession of child pornography when there is no proof that the pornography traveled in interstate commerce under a statute which requires this. It also involves whether the imposition of a fifteen year mandatory sentence on an elderly, infirm, addicted defendant violates the constitutional prohibition on cruel and unusual punishment, the guarantee of due process and the doctrine of separation of powers.

Jurisdiction of the United States District Court for the Eastern District of Pennsylvania was based on 18 U.S.C. §3231. Petitioner, James E. MacEwan, was sentenced on January 31, 2005 to the mandatory term of fifteen years imprisonment, plus a $100,000. fine and a $200. special assessment for two counts of violating 18 U.S.C. §2252A(a)(2)(B). On February 8, 2005 he appealed to the United States Court of Appeals for the Third Circuit, which has jurisdiction under 28 U.S.C. §1291.

In 2003 petitioner was sentenced to five years probation for possession of child pornography in violation of 18 U.S.C. §2252(a)(1)(B). One of the terms of probation prohibited him from possessing child pornography and permitted the probation office to make random inspections of his computer. Two such inspections disclosed material stipulated to be child pornography.

Next, petitioner ordered five video tapes in response to a solicitation from an undercover postal inspector. At trial he entered a plea of guilty to the third count of the indictment, involving this, in violation of 18 U.S.C. §2252A(a)(2)(B). At the time of trial he was 70 years of age and receiving medication for ulcer, high blood pressure, high cholesterol and type-2 diabetes. The psychological report of a defense expert stated he was addicted to Internet pornography because he ignores the consequences of a behavior linked to loss of liberty and substantial financial and social consequences. The report stated this should be treated as an addiction because it embraced three fundamental components of addiction: craving or compulsion, loss of control, and persistence in the behavior despite accruing adverse consequence.

At trial petitioner's counsel stipulated that the materials found on his computer constituted child pornography. The District Court found the Government failed to prove the offenses charge in Count 1 took place within the statute of limitations, and acquitted petitioner of those charges. He was convicted of Count 2, charging a violation of 18 U.S.C. §2252A(a)(2)(B) despite the Government's failure to prove the movement of the pictures "in interstate commerce", as charged and as required by the statute.

The Government offered evidence that the Internet connection went from petitioner's home in Pennsylvania to a regional data center in Pennsylvania. The Government conceded there was no evidence in the record where the providers of child pornography were located, and that, as charged, simple possession was not enough. (C.A. Appx. 64-65) The Government relied on the intrastate use of the Internet to establish this element.

At trial, and in the Court of Appeals, petitioner relied on decisions holding the power of Congress under the Commerce

Clause did not extend to local activity not shown to have moved across state or national boundaries. The District Court ruled the local activity nevertheless substantially affected interstate commerce, and found petitioner guilty under Count 2.

In the Court of Appeals the Government argued the local Internet activity substantially affected interstate commerce, and that the admitted use of the instrumentalities and channels of interstate commerce was sufficient by itself to establish the jurisdictional element. The Court of Appeals affirmed on the second ground, the use of channels and instrumentalities of interstate commerce, and did not predicate its decision on the first.

REASONS FOR GRANTING THE PETITION

I. This Case Presents the Important Questions of Whether the Federal Statutes Proscribing Possession of Child Pornography Shipped or Transported in Interstate or Foreign Commerce May Be Construed To Exercise the Full Extent of Congress' Power To Regulate Interstate Commerce When This Court's Decisions Construe This Language To Be a Limited Exercise of the Commerce Power

The power of Congress to regulate interstate commerce falls into three categories: (1) regulation of the channels of interstate commerce, (2) regulation and protection of the instrumentalities of interstate commerce, and (3) regulation of activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005) and cases cited. As presented in, and decided by, the District Court, this case involved the question of whether the Government established conduct that was within the third part of this test. The Court of Appeals declined to decide the case on this basis, and affirmed on other grounds, concluding that the use of the Internet constitutes a channel or instrumentality of interstate commerce, so only its use need be proved. 445 F.3d at 244-245. (Appx., *infra* at 11a-14a). In doing this, the Court of Appeals followed cases addressing the extent of Congressional power, and not those which give the language "*in* interstate commerce" its meaning.

When faced with two plausible interpretations of a federal criminal statute, the alternative that does not impute to Congress an intent to use its full commerce power to regulate conduct traditionally regulated by the States is followed.

United States v. Lopez, 514 U.S. 549, 115 S.Ct. at 1655 (1995). In interpreting a commerce regulation the terms "affecting commerce" and "involving commerce" indicate Congress' intent to regulate to the outer limits of its authority under the Commerce Clause. On the other hand, the term "in commerce" and "engaged in commerce" have a more limited reach. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-116 (2001).

The Federal child pornography statutes, 18 U.S.C. §2252A, before this court, and 18 U.S.C. §2252 use the restrictive language "shipped or transported in interstate or foreign commerce". Congress knows how to create a criminal statute that extends to the full extent of its power to regulate interstate commerce: *E.g.*, 18 U.S.C. §1952, prohibiting interstate and foreign travel in aid of racketeering enterprises ("Whoever . . . uses . . . any facility in interstate or foreign commerce . . ."); 18 U.S.C. §1958, prohibiting the use of interstate commerce facilities in the commission of murder-for-hire ("Whoever . . . uses or causes another . . . to use . . . any facility of interstate or foreign commerce . . ."); even 18 U.S.C. §1821, prohibiting the transportation of dentures under certain circumstances ("Whoever . . . uses . . . any instrumentality of interstate commerce . . ."). Congress did not use that language in the child pornography statutes.

Allowing an interpretation that changes the meaning of commerce regulation beyond this Court's decisions and ordinary Congressional usage creates a departure from the accepted and usual course of judicial proceedings. That interpretation should be reviewed by this Court.

II. The Court Should Consider the Important Question of Whether An Extensive Mandatory Minimum Sentence, Imposed on an Aged and Infirm Addicted Individual Constitutes Cruel and Unusual Punishment, a Deprivation of Due Process and Violation of the Separation of Powers in Order to Lay To Rest Uncertainties of the Extent of These Constitutional Prohibitions

While it is clear that a "gross disproportionality" analysis applies to the determination whether a penalty constitutes cruel and unusual punishment, *Lockyer v. Andrade*, 538 U.S. 63 (2003), the viability and applicability of that principle is still subject to debate in this Court: *Solem v. Helm*, 463 U.S. 277 (1983) (vacating a life sentence for a recidivist with six non-violent past felony offenses); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a sentence of twenty-five years to life for a recidivist); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting execution of mentally retarded individuals).

In *Robinson v. California*, 370 U.S. 660 (1962) this Court held a ninety day sentence, however short in the abstract, was grossly disproportionate when applied to a person convicted of being a drug addict. The psychological report submitted at sentencing in this case shows petitioner to be similarly addicted, albeit he was convicted of conduct arising from his addiction.

The fifteen year mandatory minimum this offense carries when committed by a non-violent second offender is grossly disproportionate to the offense, when considered in light of the punishment authorized for the rape of a ten year old: any term of years or life, 18 U.S.C. 2241(a), and a presumptive sentencing guideline of 135 months (11 1/2 years). Its effect here is a life sentence.

This deprivation of judicial authority, once the prosecutor elects to pursue the mandatory sentence, also suggests a violation of separation of powers, insofar as it prohibits the power to prosecute and sentence from being combined in one branch of government. *Mistretta v. United States*, 488 U.S. 361 (1989). By creating an irrebutable presumption concerning penalty without regard to the character of the offender or the specifics of the offense, due process rights are also implicated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 2006

1) Opinion of the United States Court of Appeals for the Third Circuit:

United States Court of Appeals,
Third Circuit.
United States of America
v.
James E. MacEwan, Appellant.
No. 05-1421.

Argued March 9, 2006.
Filed April 5, 2006.

Before ROTH and ALDISERT, Circuit Judges, and RODRIGUEZ,[1] District Judge.

ALDISERT, Circuit Judge.

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[1]The Honorable Joseph H. Rodriguez, Senior District Judge, United States District Court for the District of New Jersey, sitting by designation.

This appeal primarily requires us to decide if the use of the Internet satisfies the interstate commerce element of the federal law prohibiting the receipt of child pornography, 18 U.S.C. §2252A(a)(2)(B).[1] We hold that it does. The question is presented before this Court on defendant James E. MacEwan's appeal from a judgment of conviction and sentence entered on January 31, 2005, in the United States District Court for the Eastern District of Pennsylvania. MacEwan was convicted on two counts of violating §2252A(a)(2)(B)[2] and, as a repeat offender of the federal anti-child pornography laws, received a 15-year sentence pursuant to the mandatory minimum sentencing provision of 18 U.S.C. §2252A(b)(1). In addition to determining whether the jurisdictional nexus of §2252A(a)(2)(B) comports with the Constitution and was satisfied in this case, we must also decide whether the 15-year sentence imposed by the District Court pursuant to the mandatory minimum sentence requirements of 18 U.S.C. §2252A(b)(1) constitutes: (1) a violation of the

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[1] The act punishes "Any person who ... knowingly receives or distributes ... any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer...." 18 U.S.C. §2252A(a)(2)(B).

[2] We note initially that there appears to be a discrepancy between the crime charged in the indictment, the crime of conviction in the District Court's December 29, 2004 Memorandum Opinion and the crime of conviction listed in the Judgment. Count Two of the indictment, which is the focus of the present appeal, charges a violation of 18 U.S.C. §2252A(a)(2)(B). The Judgment states that MacEwan was found guilty of violating 18 U.S.C. §2252(A)(4)(B), which is not an actual offense. The Court's Memorandum Opinion states that MacEwan was charged with and is guilty of violating 18 U.S.C. §2252A(a)(4)(B). We believe these discrepancies to be mere clerical errors that may be corrected by the District Court at any time pursuant to Rule 36 of the Federal Rules of Criminal Procedure. In any event, in their briefs, both parties correctly argued the merits of MacEwan's conviction under 18 U.S.C. §2252A(a)(2)(B). The District Court should correct the judgment to state that MacEwan was convicted of violating 18 U.S.C. §2252A(a)(2)(B), as that was the offense charged and that was the crime upon which evidence was admitted and considered.

Eighth Amendment prohibition on cruel and unusual punishment, (2) a violation of the separation of powers doctrine, or (3) a deprivation of due process under the Fifth Amendment. Jurisdiction was proper in the District Court pursuant to 18 U.S.C. §3231. We have jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a)(1). For the following reasons, we will affirm the judgment and sentence in all respects.

I.

James MacEwan is a 71-year-old repeat offender of the federal laws prohibiting the distribution and receipt of child pornography. In 2001, prior to the present conviction for two counts of receiving child pornography in violation of §2252A(a)(2)(B), MacEwan had been arrested for and later pled guilty to possessing child pornography in violation of §2252(a)(1)(B). On January 30, 2003, he was sentenced to five years probation. Under the terms of his probation, MacEwan was prohibited from possessing child pornography, and his probation officer was permitted to make random inspections of his computer.

A.

Within little more than a year, MacEwan was found to have violated the terms of his probation three times, for which an indictment was returned on May 6, 2004. The indictment charged him with three counts of receiving materials containing child pornography in violation of 18 U.S.C. §2252A(a)(2)(B).

MacEwan was first discovered to have violated the conditions of his probation on July 16, 2003, when his probation officer made an unannounced visit to his home to verify his compliance with the terms of his probation. After inspecting MacEwan's computer, the officer found that MacEwan had been visiting child pornography websites. The officer then had the computer seized. Following further inspection, it was

found to contain approximately 1,068 graphic image files of child pornography. This incident formed the basis of Count One of the 2004 indictment.

The second violation was discovered on October 9, 2003, when the probation officer made another unannounced visit to MacEwan's home. After inspecting two other computers, the probation officer found links to child pornography websites. The two computers were then seized and later found to contain approximately 256 graphic image files of child pornography. This incident forms the basis for Count Two.

The third violation occurred on March 10, 2004, when an undercover United States Postal Inspector, posing as a letter carrier, delivered five videotapes containing child pornography to MacEwan's home. MacEwan had previously ordered these tapes from a catalogue sent by the government as part of an investigation into a global child pornography enterprise. MacEwan was selected to receive the catalogue solicitation because, during the course of the investigation, his name had previously been identified on a customer list for a child pornography website. After the videotapes were delivered and in MacEwan's possession, the Postal Inspectors then retrieved the videotapes pursuant to an anticipatory search warrant. This incident forms the basis for Count Three.

B.

On October 28, 2004, MacEwan entered a guilty plea to Count Three, but proceeded to trial on Counts One and Two. Following a bench trial held that same day, he was acquitted of Count One because the government failed to prove that he had received the image files that were the subject of that count within the applicable statute of limitations period. MacEwan was, however, found guilty of Count Two.

At trial, MacEwan had stipulated to the number of images charged in Counts One and Two, that they met the statu-

tory definition of child pornography, and that the files had been knowingly downloaded from the Internet. He argued, however, that the government could not establish that, in compliance with the interstate commerce jurisdictional element of §2252A(a)(2)(B), there was an interstate transmission of the pornographic images. He contended that, absent proof to the contrary, the images could just as easily have traveled intrastate and that such an activity was beyond the reach of Congress under the Commerce Clause.

To support its argument that the images had traveled in interstate commerce, the government had James Janco, the manager of Comcast's Network Abuse Department, testify. Comcast was MacEwan's Internet service provider from December 2002 to October 14, 2003. Janco chiefly summarized the flow of data over the Internet and the routing of subscribers' website connection requests.

He stated that when a Comcast subscriber accesses the Internet from his home computer and requests a connection with a website, the connection would first originate from the subscriber's computer, pass through the cable modem—both of which are located in the subscriber's house—and then be sent to a regional data center. For West Chester, Pennsylvania, where MacEwan resided, Comcast's regional data center was located within Pennsylvania. The regional data center takes the subscriber's request, transfers it through various routers within the regional data center, then sends the request to the Internet backbone, which is a series of leased, commercial and private lines. Janco then stated that those lines take the subscriber's specific request and connect it to the server containing the desired website.

Comcast calls this process of accessing a website "Shortest Path First" ("SPF"). Under SPF, when the signal travels from the regional data center it will be dynamically routed

along the lines with the least volume of Internet traffic, rather than those covering the shortest geographical distance. In Janco's words: "[I]f the lines that [the request] would normally go within Pennsylvania are clogged or have a high amount of traffic on it, [the Internet backbone] would dynamically assign [the request] to another line connection and send it out of the shortest path first, what typically would be in the State of Pennsylvania in this case." (Trial Transcript, app. at 50-51.) Janco acknowledged, however, that if the Pennsylvania lines are full or too busy, the connection request could instead be routed through lines outside of Pennsylvania, even if the requested website were located on a server located within Pennsylvania. He stated that it was impossible to scientifically ascertain the exact path "any specific request, at a point in time would have done."[3] (*Id.* at 54.) Ultimately, however, the connection request would end up "wherever the server is physically located where [the subscriber] is trying to go." (*Id.* at 50-51.) This server could be located in Pennsylvania or anywhere else within the United States.

Before the close of trial, MacEwan made a motion for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. His motion contended that the government failed to prove the interstate commerce jurisdictional element of §2252A(a)(2)(B) because there was no evidence presented at trial showing that the downloaded image files ever traveled outside of the state of Pennsylvania. He also contended that, as for Count One, the government failed to prove beyond a reasonable doubt that the image files were received within the statute of limitations period for §2252A(a)(2)(B).

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[3] Janco also stated that Comcast does not monitor data-routing traffic and thus does not possess any records that would indicate the specific route MacEwan's requests would have taken in accessing the child pornography websites. (Trial Transcript, app. at 66-67.)

In its Memorandum Opinion dated December 29, 2004, the trial court rejected MacEwan's Rule 29(a) motion on Count Two[4] and held that "the evidence which the government presented, that the images on the Defendant's computers were received through the internet, is sufficient to carry its burden of proof as to interstate commerce, and that it is not necessary to prove that the specific images were received from a source outside of Pennsylvania." (Opinion of the District Court, at 6.) It also rejected MacEwan's challenge that the jurisdictional prong of §2252A(a)(2)(B) is beyond Congress' power in light of *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), and *Jones v. United States,* 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000). In so ruling, the District Court relied heavily on this Court's holding in *United States v. Rodia,* 194 F.3d 465 (3d Cir.1999),[5] which was decided after *Lopez,* but before *Morrison* and *Jones.*

C.

MacEwan's sentencing hearing was held on January 31, 2005, where the District Court determined that the enhanced sentencing provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650 (2003),

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[4] The Court granted his Rule 29(a) motion on Count One, holding that the government failed to prove beyond a reasonable doubt that MacEwan received the images that were the subject of that charge within the applicable statute of limitations period.

[5] In *Rodia,* this Court held that Congress had the power to regulate the intrastate possession of child pornography under its Commerce Clause powers because such possession has a "substantial effect on interstate commerce." *Rodia,* 194 F.3d at 478-479. There, however, we were interpreting the jurisdictional element of §2252(a)(4)(B), not §2252A(a)(2)(B). Accordingly, although the reasoning in *Rodia* may be persuasive in guiding our analysis of Congress' Commerce Clause powers, it is not controlling.

effective as of April 30, 2003, applied to MacEwan because of his 2003 conviction for violating 18 U.S.C. §2252(a)(1)(B). Pursuant to those enhancement provisions, MacEwan, as a repeat offender of Chapter 110 of Section 18 of the U.S.Code, was required to receive a minimum sentence of 15 years in prison. *See* 18 U.S.C. §2252A(b)(1). MacEwan objected to the application of this mandatory minimum, arguing that it violates the Eighth Amendment prohibition on cruel and unusual punishment, the Fifth Amendment Due Process Clause right to an individualized sentence, and the separation of powers doctrine. The Court rejected these arguments and accordingly sentenced MacEwan to 15 years in prison with five years of supervised release. This appeal of both his conviction and sentence followed.

II.

MacEwan presents a twofold challenge to the jurisdictional element of 18 U.S.C. §2252A(a)(2)(B). He first contends that it must be strictly interpreted to require the government to prove that the child pornography images were transmitted interstate; otherwise, he contends, the jurisdictional element unconstitutionally expands Congress' power under the Commerce Clause to punish purely intrastate acts. Second, in what is essentially a sufficiency of the evidence challenge, MacEwan contends that the government failed to prove beyond a reasonable doubt that he met the jurisdictional element of §2252A(a)(2)(B).

A.

We exercise plenary review over MacEwan's challenges to the interpretation and constitutionality of the interstate commerce jurisdictional element of 18 U.S.C. §2252A(a)(2)(B). *See Rodia,* 194 F.3d at 469. Section 2252A(a)(2)(B) punishes "[a]ny person who ... knowingly receives or distributes ... any material that contains child por-

nography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer."

MacEwan faults the District Court for its broad holding that regardless of whether the images originated in Pennsylvania or out-of-state, the government showed that the images were downloaded from the Internet, which was "sufficient to carry its burden of proof as to interstate commerce." (Opinion of the District Court, at 6.) He contends that because the government could not conclusively prove that the child pornography images crossed state lines in their Internet transmission, he is therefore being punished essentially for his mere intrastate possession of child pornography. He then argues that §2252A does not reach this activity, or, in the alternative, that if it did, Congress does not have the power under the Commerce Clause to punish those who possess child pornography that has not been transmitted interstate.

MacEwan is conflating "interstate commerce" with "interstate transmission" and confusing the nature of the jurisdictional basis for his charged offense.[6] Nowhere in the stat-

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[6]MacEwan argues that "Congress' inclusion of 'computer' in [the §2252A(a)(2)(B) jurisdictional provision] demonstrates that the internet was considered to be a possible method of interstate transport, but did not by itself constitute interstate transport." (MacEwan Br. at 17.) He then argues that "Congress[']intention to criminalize the use of a computer to transport prohibited images in interstate commerce prohibits a finding that the statute also criminalized the use of a computer to send images intrastate." (*Id.* at 17-18.) Had Congress intended for the meaning of the term "interstate commerce" to equate to the transmission of image files over the Internet, he argues that it would have so indicated. We disagree. When interpreting a statute, we are to endeavor to give the terms of the statute their ordinary meaning whenever possible. *Okeke v. Gonzales*, 407 F.3d 585, 593 (3d Cir.2005). Moreover, "[i]n construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (citation omitted). Congress' specific inclusion of the term "including by computer" denotes its special concern for the transmis-

ute does it state that the child pornography images must have crossed state lines; rather, it states solely that they must have been "transported in interstate ... commerce by any means, including by computer." *See Okeke v. Gonzales*, 407 F.3d 585, 593 (3d Cir.2005) (stating that we will give terms of statutes their plain and ordinary meaning). With this distinction in mind, we must therefore analyze whether downloading an image of child pornography from the Internet (1) involves the receipt of something transported in interstate commerce, and (2) whether it is a constitutional exercise of Congress' power under the Commerce Clause to punish those who use the Internet to download such images.

1.

"The Internet is an international network of interconnected computers ... [and is comparable] to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Reno v. ACLU*, 521 U.S. 844, 850-853, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Moreover, as is evident from the trial testimony of the government's expert, unless monitored by specific equipment, it is almost impossible to know the exact route taken by an Internet user's website connection request, such as MacEwan's requests to connect with various child pornography websites. Because of fluctuations in the volume

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sion of child pornography by electronic means. It defies sound reason to read this provision to exclude transmissions of child pornography over the Internet. The downloading of images from the Internet is synonymous with the transmission of images in interstate commerce by computer. *See infra.* To not so read the statute would render the term "including by computer" effectively meaningless. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (citations and quotations omitted) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Accordingly, we reject MacEwan's reading of the statute.

of Internet traffic and determinations by the systems as to what line constitutes the "Shortest Path First," a website connection request can travel entirely intrastate or partially interstate.

Regardless of the route taken, however, we conclude that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce. Here, once the images of child pornography left the website server and entered the complex global data transmission system that is the Internet, the images were being transmitted in interstate commerce. To quote the Court of Appeals for the First Circuit in *United State v. Carroll*, the "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." 105 F.3d 740, 742; *see United States v. Runyan*, 290 F.3d 223, 239 (5th Cir.2002) (same).

2.

That said, it is clear that Congress has the power to regulate the downloading of child pornography from the Internet. The Commerce Clause gives Congress power to regulate three types of activity: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce." *See Lopez*, 514 U.S. at 558-559, 115 S.Ct. 1624. Ignoring the first and second categories cited by *Lopez*, MacEwan proceeds to the third, and argues that because the government could not prove that the child pornography images traveled across state lines, the jurisdiction over his activ-

ity was only then created by his mere possession of child pornography. He then contends that, pursuant to *Lopez* and *Morrison*, Congress lacks the authority to regulate this activity because the mere *intrastate* possession of child pornography does not have a substantial impact on *interstate* commerce.

We disagree with this approach. In addressing the transmission of child pornography images over the Internet, we need not proceed to an analysis of *Lopez's* third category when Congress clearly has the power to regulate such an activity under the first two. *See United States v. Bishop*, 66 F.3d 569, 588 n. 29 (3d Cir.1995) ("*Lopez* involved only a regulation that was justified, if at all, under Category Three [(the substantial effects test)] ... [a]s such, *Lopez* does not affect our analysis here [of Category Two]."); *compare with Lopez*, 514 U.S. at 559, 115 S.Ct. 1624 (proceeding to an analysis of congressional power under Category Three, where it was not argued that the first two categories applied); *Morrison*, 529 U.S. at 609, 120 S.Ct. 1740 (same). Indeed, it is difficult to find an act more intertwined with the use of the channels and instrumentalities of interstate commerce than that of downloading an image from the Internet. *See United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir.2004) ("Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact."). Accordingly, we are able to state conclusively that Congress' power under §2252A(a)(2)(B) lies in its ability to regulate the channels and instrumentalities of interstate commerce.[7]

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[7] By basing Congress' power to regulate the transmission of child pornography via the Internet under §2252A(a)(2)(B) upon its power to regulate the chan-

3.

Having concluded that the Internet is an instrumentality and channel of interstate commerce,[8] it therefore does not matter whether MacEwan downloaded the images from a server located within Pennsylvania or whether those images were transmitted across state lines. It is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce. *See Lopez*, 514 U.S. at 558, 115 S.Ct. 1624 (stating that Congress has the power to regulate an instrumentality of interstate commerce even though the "threat may come only from intrastate activities"); *Bishop*, 66 F.3d at 588 (holding that Congress has the power to regulate the instrumentalities of interstate commerce even though the wrongful conduct may occur wholly intrastate).

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nels and instrumentalities of interstate commerce, we avoid the necessity of revisiting our holding in *Rodia* by analyzing whether MacEwan's mere possession of child pornography that may have traveled wholly intrastate had a substantial impact upon interstate commerce as required by *Lopez's* Category Three. *See Rodia*, 194 F.3d at 473 (conducting such an analysis, as required by *Lopez*, as to whether the mere intrastate possession of such materials was something Congress could prohibit). Accordingly, insofar as the District Court premised its conclusions upon *Rodia*, we affirm on other grounds. *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n. 1 (3d Cir.1983) ("An appellate court may affirm a result reached by the district court on different reasons, as long as the record supports the judgment.").

[8] Because the Internet is a worldwide communications system composed of an interconnected network of computers, data lines, routers, servers, and electronic signals, it is difficult to discern when the instrumentality component of *Lopez's* Category Two ends and the channel component of *Lopez's* Category One begins. We find no need to make a distinction between the two categories, however, because the Internet is both a channel of interstate commerce, *see Extreme Associates*, 431 F.3d 150, 161 (3d Cir.2005) ("The Internet is a channel of commerce covered by the federal statutes regulating the distribution of obscenity."), and, much like a bridge, railroad, highway, or airplane, it constitutes an instrumentality of interstate commerce, *see Bishop*, 66 F.3d at 588 (listing types of interstate instrumentalities).

B.

At trial, MacEwan stipulated that he downloaded from the Internet the child pornography images that were the subject of his conviction for Count Two of the indictment. Accordingly, in light of our conclusion that the government is not required to prove that the child pornography images crossed state lines before being downloaded and received by the defendant, but rather only must prove that the images were downloaded from the Internet, which is properly regulated by Congress as a channel and instrumentality of interstate commerce, it is beyond doubt that the government proved that MacEwan satisfied the jurisdictional element of §2252A(a)(2)(B). *Cf. United States v. Kimler*, 335 F.3d 1132, 1138 n. 7 (10th Cir.2003) (stating that even if the ultimate source of the child pornography images was an intrastate distributor, the defendant's activity "would still be interstate if, as the evidence at trial established, he sent and received the images in interstate commerce over the internet"); *United States v. Hilton*, 257 F.3d 50, 54 (1st Cir.2001) ("[P]roof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense.").

III.

We next turn to MacEwan's challenges to his 15-year sentence. As part of an effort by Congress "to restore the government's ability to prosecute child pornography offenses successfully," the PROTECT Act amended §2252A to provide increased punishment for repeat child pornography offenders. S.Rep. No. 108-2, at 1 (2003). The Act increased the mandatory minimum sentences for repeat offenders from five to 15 years. PROTECT Act, Pub.L. No. 108-12, §103(b)(1)(E)(ii), 117 Stat. 650, 653 (2003) (codified as amended at 18 U.S.C. §2252A(b)(1)). Effective as of April

30, 2003, the amended mandatory minimum sentencing provision now states that:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. §2252A(b)(1) (2004). Prior to the instant case, MacEwan had entered a guilty plea and was sentenced to probation for possessing child pornography in violation of 18 U.S.C. §2252(a)(1)(B). His present conviction on two counts of knowingly receiving child pornography images in violation of 18 U.S.C. §2252A(a)(2)(B) triggered the enhanced sentencing measures of the PROTECT Act.[9]

MacEwan contends that the 15-year mandatory minimum sentence required by §2252A(b)(1) is unconstitutional because it violates the Eighth Amendment prohibition on cruel and unusual punishment, the separation of powers doc-

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[9] We also note that even if we had not determined that Congress had the power under the Commerce Clause to regulate MacEwan's downloading of child pornography, he still pled guilty to Count Three of the indictment which also charged a violation of §2252A(a)(2)(B) for his receipt, by mail, of five videotapes containing child pornography. Accordingly, regardless of our treatment of his conviction for Count Two, MacEwan would still be subject as a repeat offender to the mandatory minimum 15-year sentencing requirement of §2252A(b)(1).

trine and the Fifth Amendment Due Process Clause right to an individualized sentence. We exercise plenary review over these constitutional challenges to the 15-year mandatory minimum sentence of §2252A(b)(1). *See Rodia*, 194 F.3d at 469 (exercising plenary review over constitutional questions). We will deal with each contention in turn.

A.

MacEwan argues that the 15-year mandatory minimum sentence of §2252A(b)(1) offends the Eighth Amendment as "cruel and unusual punishment," because it is grossly disproportionate to the offenses that MacEwan committed and is at odds with the "evolving standards of decency" that are a part of American society. *See Atkins v. Virginia*, 536 U.S. 304, 311-312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In arguing that the mandatory minimum provision of §2252A(b)(1) offends the Eighth Amendment, MacEwan cites no cases where any court has found that such a mandatory minimum non-lifetime sentence offends the Eighth Amendment. We will therefore begin our Eighth Amendment proportionality analysis by examining the framework presented by the Supreme Court in *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), and *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and our own court in *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir.1986).

In *Ewing*, the plurality opinion[10] states that the "Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" 538 U.S. at 20, 123 S.Ct. 1179 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-997, 111 S.Ct.

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[10]Justice O'Connor wrote the plurality opinion, which Chief Justice Rehnquist and Justice Kennedy joined. Justices Scalia and Thomas filed opinions concurring in the judgment, but stating that the Eighth Amendment contains no proportionality principle. *See Ewing*, 538 U.S. at 31-33, 123 S.Ct. 1179.

2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment)). When evaluating proportionality challenges to sentences under the Eighth Amendment, courts must examine three factors: (1) "the gravity of the offense and the harshness of the penalty"; (2) "the sentences imposed on other criminals in the same jurisdiction"; and (3) "the sentences imposed for commission of the same crime in other jurisdictions." *Solem,* 463 U.S. at 290-292, 103 S.Ct. 3001. When conducting this analysis, this Court has recognized that we " 'should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.' " *Rosenberg,* 806 F.2d at 1175 (quoting *Solem,* 463 U.S. at 290, 103 S.Ct. 3001).

This principle of substantial deference therefore "restrains us from an extended analysis of proportionality save in rare cases." *Id.* (quoting *Solem,* 463 U.S. at 290 n. 16, 103 S.Ct. 3001). Consequently, in assessing such a challenge, the first proportionality factor acts as a gateway or threshold. If the defendant fails to show a gross imbalance between the crime and the sentence, our analysis is at an end. We, therefore, must focus upon whether MacEwan's is "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Ewing,* 538 U.S. at 30, 123 S.Ct. 1179 (quoting *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J.)). If no such inference of gross disproportionality exists, then we are not bound to conduct any "comparative analysis 'within and between jurisdictions' " as required by *Solem's* second and third factors. *Id.* at 23, 123 S.Ct. 1179 (quoting *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J.)).

1.

Turning to the first proportionality factor, we note that the Eighth Amendment does not demand strict proportionality between the crime and the sentence; rather, it forbids only those sentences that are "grossly disproportionate" to the crime. *Id.* at 23, 123 S.Ct. 1179. Indeed, "successful challenges to the proportionality of particular sentences should be exceedingly rare." *Id.* at 22, 123 S.Ct. 1179 (quoting *Hutto v. Davis*, 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam)). Here, the harshness of the 15-year mandatory minimum sentence is not premised purely upon the commission of the crimes charged in the 2004 indictment, but also upon the fact that MacEwan is a recidivist who has *previously* committed the crime of receiving child pornography. Indeed, the punishment of recidivism, as occurs in §2252A(b)(1), "has long been recognized as a legitimate basis for increased punishment." *Id.* at 25, 123 S.Ct. 1179.

An appellant confronts a very high bar when challenging a sentence mandated by Congress as the minimum punishment for a recidivist offender. In *Ewing*, the Supreme Court upheld the California three-strikes law in the face of a challenge by a defendant who had received a mandatory sentence of 25 years to life for his conviction of felony grand theft of three golf clubs. *Id.* at 28, 30-31, 123 S.Ct. 1179. The defendant had previously been convicted of four serious or violent felonies. *Id.* at 19, 123 S.Ct. 1179. In *Rummel v. Estelle*, the Court upheld a life sentence for a defendant who was convicted under a three-strikes law where the triggering offense was the obtaining of $120.75 by false pretenses and the appellant had committed two previous fraud felonies where the amount obtained was $80 and $28.36, respectively. 445 U.S. 263, 265-266, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). It was only in *Solem* that the Court ruled that a life sentence pun-

ishment for a recidivist offender violated the proportionality principles of the Eighth Amendment. 463 U.S. at 296-297, 103 S.Ct. 3001. There, the defendant—who had been convicted of uttering a "no account" check for $100, which is a felony, and had six prior minor and nonviolent felonies on his record—was appealing a life sentence without the possibility of parole. *Id.* In distinguishing its differing treatments of the defendants in *Solem* and *Rummel*, the Court noted that the defendant in *Rummel* faced the possibility of parole for his sentence, whereas the defendant in *Solem* could only petition for executive clemency, which is a vastly different and much more unpredictable system. *Id.* at 300-301, 103 S.Ct. 3001.

2.

Here, MacEwan is facing a 15-year mandatory minimum prison term that he received for violating federal anti-child pornography laws not once, but twice. His crimes were at least as serious as those committed by the appellants challenging their life sentences in *Rummel* and *Ewing*, which the Supreme Court upheld as constitutional. And, unlike the appellant in *Solem*, MacEwan's triggering crime is not "one of the most passive felonies a person could commit," such as the utterance of a "no account" check for $100. *See Solem*, 463 U.S. at 296, 103 S.Ct. 3001. Moreover, the sentence received by MacEwan, unlike those received by the defendants in *Rummel* and *Solem*, is not a life sentence, but 15 years.[11] In-

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[11] MacEwan attempts to inflate the magnitude and nature of his sentence, and cast it as a life term, by arguing that he is 70 years old and in bad health, and therefore cannot possibly hope to survive the 15-year term. (*See* MacEwan Br. at 34, 40.) In support of this argument he cites to *United States v. Martin*, wherein the Seventh Circuit ruled that it was an abuse of discretion for a district court to sentence a 45-year-old convicted of arson to 50 years in prison, which it found to be a *de facto* life sentence, where the statute did not authorize a life sentence as a penalty. 63 F.3d 1422, 1433-1434 (7th Cir.1995). Unlike the Seventh Circuit in

deed, in *United States v. Gross*, the Court of Appeals for the Seventh Circuit ruled that the 15-year mandatory minimum sentence provision of §2252A(b)(1) does not violate the proportionality principles of the Eighth Amendment where the defendant had been convicted of distributing child pornography in violation of 18 U.S.C. §2252A(a)(2)(B) and he had been convicted previously of sexual assault of a minor and lewdness with a minor. 437 F.3d 691 (7th Cir.2006).

MacEwan has repeatedly violated the federal anti-child pornography laws, and attempts to downplay the nature of those offenses by claiming that he is not a violent offender, or a trafficker in drugs or guns. We do not agree with this use of relativistic arguments to diminish the seriousness of his offenses. In evaluating the magnitude of the harm caused by child pornography, we defer to the findings made by Congress. The congressional findings underlying §2251 repeatedly stress that child pornography "is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved." Child Pornography Prevention Act of 1996, Pub.L. No. 104-208, §121, 110 Stat. 3009, 3009-26

Martin, however, we are dealing with a 15-year mandatory minimum sentence imposed by statute, not a statute allowing the imposition of any term of years except a lifetime sentence. MacEwan cites no cases indicating that a *de facto* life sentence created by a statutory mandatory minimum term of years is a violation of the Eighth Amendment.

We also cannot agree with MacEwan's attempts to cast his sentence as a punishment for an addiction in violation of *Robinson v. California*, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (finding unconstitutional a 90-day sentence imposed for being addicted to narcotics). (*See* MacEwan Br. at 30-32, 40.) MacEwan might have a problem controlling his urges to view child pornography, but that is not what the statute is punishing. Unlike in *Robinson*, where the statute punished the status of being an addict, the statute here punishes one for repeatedly violating the federal laws prohibiting the receipt of child pornography. *Cf. United States v. Pena*, 125 F.3d 285, 287-288 (5th Cir.1997) (concluding that the statute at issue is not unreasonable where it punishes the violation of probation for using narcotics, not the defendant's addiction to narcotics).

(1996) (codified as amended at 18 U.S.C. §2251).[12] Congress found that "where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years." *Id.* Moreover, Congress found little distinction in the harm caused by a pedophile, be he a distributor or mere consumer in child pornography, because the mere "existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children." §121, 110 Stat. at 3009-27. Furthermore, "it inflames the desires of ... pedophiles ... who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials." *Id.; see also New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

3.

In light of the heavy burden that an appellant must carry in order to show that his sentence is grossly disproportionate,

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[12] We discuss these congressional findings even though they were not made in relation to the recent 2003 PROTECT Act amendments to §2252A(b)(1). The issues discussed in the congressional findings for the amendments to §2251 discuss the harm caused by child pornography, which the PROTECT Act amendments were designed to directly combat. *See* S.Rep. No. 108-2, at 1 (2003) (stating that the PROTECT Act was designed to "restore the government's ability to prosecute child pornography offenses successfully"). This Court has held that we are able to examine congressional findings underlying other acts where the findings discuss a matter closely related to the issues underlying the presently analyzed law. *See Rodia*, 194 F.3d at 474 n. 4 (analyzing the congressional findings for the 1978 Protection of Children Against Sexual Exploitation Act to better understand the amendments made by Congress in 1990 to §2252).

it is clear that MacEwan's is not one of those rare cases where the gravity of his crime of conviction is so outweighed by the harshness of his sentence that we are led to reach "an inference of gross disproportionality." We therefore do not need to extend our Eighth Amendment proportionality analysis to an examination of the crimes committed and sentences received by other defendants in the federal and state jurisdictions.[13] See Rosenberg, 806 F.2d at 1176 ("Because we do not believe that this case warrants an extended eighth amendment analysis, we need not attempt to match defendants' sentences with the statistics."). Although we agree that the 15-year sentence is harsh, it was duly enacted by Congress as a punishment for those who had repeatedly taken illicit advantage of one of the most vulnerable segments of our society, its children. Accordingly, we conclude that the 15-year mandatory minimum sentence required by §2252A(b)(1) for repeat child pornography offenders is not a cruel and unusual punishment in violation of the Eighth Amendment.

B.

[10] MacEwan next argues that the mandatory minimum provision of §2252A(b)(1) violates the separation of powers doctrine. He contends that by enacting a statutory mandatory minimum, Congress has "stripped the judiciary of its historic role in the sentencing process and has transferred that judicial pc er to the executive branch and deprived defendants and the public of the right to, and social benefits of,

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[13] In so ruling, we decline to examine the statistics that MacEwan has presented demonstrating the sentences prescribed by various state jurisdictions as punishment for the possession of child pornography. (*See* MacEwan Br. at 37 n. 3.) Furthermore, notwithstanding MacEwan's entreaties to the contrary, we also conclude that it is unnecessary for us to conduct a comparative analysis between the sentence received by an individual convicted of receiving child pornography a second time and the sentences received for those convicted of second-degree murder, kidnapping or rape. (*See id.* at 35-36.)

individualized sentences." (MacEwan Br. at 42.) He argues that this system, in effect, " 'unite[s] the power to prosecute and the power to sentence within one Branch' " because it vests power in the prosecutors to decide when to charge an offense triggering the mandatory minimum sentencing provision. (*Id.* at 44 (quoting *Mistretta v. United States*, 488 U.S. 361, 391 n. 17, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)).)

In considering MacEwan's argument, we must first address the nature of the separation of powers doctrine. In *Lujan v. Defenders of Wildlife*, the Supreme Court observed that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Illustrating that common understanding, in *Eash v. Riggins Trucking Inc.*, this Court stated that the "first sentence of the Constitution expressly vests the legislative power in Congress, Art. I, §1" and that "Congress through its Article I, Section 8 power to enact those laws that are 'necessary and proper' has the exclusive power to define offenses and to establish penalties." 757 F.2d 557, 573 (3d Cir.1985).[14] Conversely, in discussing prosecutors' powers, we have stated that "the decision whether or not to prosecute and what charges to file generally rests within the prosecutor's broad discretion." *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir.1992).

Turning now to the present dispute over mandatory minimum sentences, we note that the Supreme Court has specifi-

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[14] In *Eash*, we were merely restating a maxim put forth almost two hundred years ago by the Supreme Court in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). Therein, the Court addressed the power of the judicial branch by examining the power granted by the legislative branch, stating: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34.

cally held that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States,* 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). Moreover, it has observed that "determinate sentences were found in this country's penal codes from its inception ... and some have remained to the present." *Id.* (citations omitted). Similarly, this Court has also acknowledged our traditionally limited discretion in sentencing:

> While the pronouncement of sentence after a trial or a guilty plea may be an inherently judicial function, the proposition that specifying the sentence is an inherently judicial function is not supportable either by history or by the text of the Constitution. The Supreme Court has consistently recognized that Congress has plenary authority over the designation of appropriate punishment for federal crimes. *See United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978); *Ex parte United States,* 242 U.S. 27, 42, 37 S.Ct. 72, 74, 61 L.Ed. 129 (1916). The early practice was for Congress to prescribe specific punishments for specific crimes, and it was only much later that Congress delegated to the federal courts the broad discretion in sentencing which they have exercised in recent years. *Grayson,* 438 U.S. at 45-46, 98 S.Ct. at 2613, 98 S.Ct. 2610. The Supreme Court rejected the proposition that the power over sentencing is inherently judicial when it decided that Congress' delegation of the authority to determine release dates to the Parole Commission validly implied that the judge has no enforceable expectations with respect to the release date, short of the statutory term. *United States v. Addonizio,* 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). Likewise, this court in *Geraghty v. United*

> *States Parole Commission,* 719 F.2d 1199, 1208 (3d Cir.1983), *cert. denied,* 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 133 (1984), squarely held that the legislation creating the federal parole board was not an impermissible delegation of an inherently judicial function. Thus, we hold that Congress may lawfully curtail judicial discretion in sentencing.

United States v. Frank, 864 F.2d 992, 1010 (3d Cir.1988) (addressing a similar contention that the Sentencing Reform Act of 1984 unconstitutionally stripped the federal courts of their traditional role in sentencing).

As for MacEwan's argument that the mandatory minimum provision of §2252A(b)(1) vests too much power in prosecutors to decide the sentence of defendants via the charging of specific triggering offenses, we have held that it is "well settled that a legislature can exercise its right to limit judicial discretion in sentencing by bestowing on prosecutors the right to make decisions that may curtail judicial discretion." *Ehrsam v. Rubenstein,* 917 F.2d 764, 767 (3d Cir.1990) (rejecting appellant's argument that the Sentencing Guidelines vest an unconstitutional amount of discretion in prosecutors).

It is the Congress that has the power to define a crime and set its punishment. Notwithstanding that we judges may have imposed a lesser sentence in the case before us, and question the application of draconian mandatory minimum sentences in some cases, our jurisprudential hands are tied. The great Cardozo taught us long ago: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921). Although we recognize that a host of inequities inhere in many large mandatory sentences, the relief must come from the legislative arm of government and not from the judges of the Third Article. Mandatory minimum

sentencing provisions do restrict, or in some cases strip, the courts of the power to impose an individually-crafted sentence for a specific defendant; nevertheless, we cannot agree that the use of mandatory minimums violates the doctrine of separation of powers. Accordingly, we may not disturb Congress' power to define a sentence for a crime unless the sentence mandated for a crime offends the Constitution, i.e., is a cruel and unusual sentence or offends the Due Process Clause of the Fifth Amendment. *See Chapman*, 500 U.S. at 465, 111 S.Ct. 1919 (citations omitted) ("[A] court may impose, whatever punishment is authorized by statute for [an] offense, so long as that penalty is not cruel and unusual ... and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.").

C.

Finally, MacEwan argues that the mandatory minimum sentencing provision of §2252A(b)(1) is unconstitutional because "the Due Process Clause dictates that [he] should have been the recipient of individualized sentencing in connection with the sentence to be imposed." (MacEwan Br. at 45.) We need not dwell upon this argument, however, because this Court has repeatedly held that there is no due process right to individualized sentences. *See Ehrsam*, 917 F.2d at 766 ("We reaffirm our previously expressed view that the Due Process Clause permits mandatory sentences."); *Frank*, 864 F.2d at 1010. Rather, "[a] sentencing scheme providing for 'individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.'" *Chapman*, 500 U.S. at 467, 111 S.Ct. 1919. Accordingly, we determine that the 15-year minimum sentence mandated by §2252A(b)(1) does not offend the Due Process Clause of the Fifth Amendment.

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We therefore hold that the Internet is both a channel and instrumentality of interstate commerce and that Congress can regulate the downloading of child pornography over the Internet under 18 U.S.C. §2252A(a)(2)(B) even if the transmission never crossed state lines. Moreover, because MacEwan admitted that he downloaded the images from the Internet, sufficient evidence existed for a trier of fact to find the interstate commerce jurisdictional element of §2252A(a)(2)(b) met beyond a reasonable doubt. Finally, we conclude that the 15-year mandatory minimum sentence of §2252A(b)(1) offends neither the Eighth Amendment prohibition on cruel and unusual punishment, the separation of powers doctrine, nor the Due Process Clause of the Fifth Amendment. We will affirm the conviction and sentence of the District Court.

2) Opinion of the United States District Court for the Eastern District of Pennsylvania

In the United States District Court
for the Eastern District of Pennsylvania

United States of America — Criminal Action
No. 04-262

v.

James E. MacEwan

MEMORANDUM

Baylson, J. — December 29, 2004

The Defendant was indicted on May 6, 2004 and charged with three counts for the receipt of child pornography in violation of 18 U.S.C. §2252 A (a)(4)(B). Count I charges that the Defendant received child pornography, between on or about January 30, 2003 and on or about July 16, 2003;" Count II charges that Defendant received child pornography, between on or about July 16, 2003 and on or about October 9, 2003;" and Count III charges that Defendant received child pornography on or about March 10, 2004.

This case was listed for trial on October 28, 2004 at which time Defendant pled guilty, without any plea agreement with the government, to Count III, and agreed to a trial without a jury on Counts I and II.

The testimony at the trial was exclusively presented by the government, following which Defendant moved for a directed verdict and then rested. John Sanderson testified that he was a probation officer supervising Defendant's probation following his conviction on a similar charge, and visited Defendant's home pursuant to a random computer inspection. The Defendant was not allowed to have child pornography as a condition of his probation from his prior conviction.

On July 16, 2003, at one of these visits, Mr. Sanderson, in the course of inspecting Defendant's computer, found child pornography on the computer in a file downloaded from the internet and maintained in a "my favorites" folder.

The government's next witness was James Janco of Comcast, a provider of computer services through cable networks. Mr. Janco manages the Comcast Network Abuse Department and testified that Comcast provided internet service to Defendant from 2002 through October 14, 2003 at Defendant's home at 954 Cornwallis Drive. The government presented this testimony in an effort to prove the Defendant received the images of child pornography found on his computer through interstate commerce. The statute under which Defendant is prosecuted requires that the child pornography which the Defendant is accused of receiving, "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer. . ."[1]

Mr. Janco testified that when a computer user attempts to access the internet, the connection to the internet would originate from the consumer's computer, go through the cable modem, both of which are located in the customer's home, and the request would be sent to what Comcast calls a "Regional Data Center" which is a termination point for all connections of its subscribers in a general area. The Comcast Regional Data Center for Defendant is located in Pennsylvania:

> It takes the customer's request along with many other requests in that geographical area and it triages it

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[1]Although there does not appear to be any dispute that the Defendant "possessed" the material, and this would itself subject him to conviction regardless of the dates of receipt, the government acknowledged that the indictment charges that the Defendant "knowingly received" the material and thus the government was obliged to prove that the material traveled in interstate commerce, and also the date of receipt. See N.T. at 52-53.

to a number of different switches within that regional data center. In essence it's a transfer point, it's taking the request from the end user and ultimately sending it out to the internet.

Q. And when you say sending it out to the internet, what does that entail?

A. It entails receiving – sending within the regional data center the request from the, when we call universal broadband router, which is where the subscriber's modem would actually terminate, it would send it to another router, again we're still within the regional data center, ultimately it would, what we would call, hop to a core router, again within a regional data center and from that point, the request would be sent to the internet backbone, which is a series of leased, commercial and private lines.

Q. And are those entirely within the state of Pennsylvania?

A. No, they are not.

(N.T. at 37)

Mr. Janco testified that Comcast would send the message to the requesting server, whatever the internet site is that the user was trying to access . . . it isn't a direct telephone line, but rather based on what we call, shortest path first. . . ." (N.T. at 38). Mr. Janco testified that the message could be routed through other states and then come back to Pennsylvania. Mr. Janco testified that when a consumer logs on to an internet site, the message could be routed anywhere the server is physically located. However, the Comcast records would not show for a particular date what route a message sent on Defendant's computer would have taken. On cross examination, Mr. Janco testified that he could not tell, as to the websites Defendant accessed during the time period of the indictment,

where the servers for those websites were located or whether Defendant used any lines in accessing websites that went outside the state of Pennsylvania. (N.T. at 42-43).

Mr. Janco also testified that the use of the internet would not necessarily involve interstate traffic; although Comcast could possibly monitor the source and receipt of specific internet messages if it deployed intercept boxes on targets, such as in compliance with FISA orders. In the normal course of its business, Comcast does not monitor traffic and thus cannot tell whether specific traffic, in connection with a specific user's assessing a specific website, occurred in Pennsylvania or not. See N.T. at 54-55.

The government next called Donald Justin Price, an FBI agent with training in computer forensics who testified that a computer user who had certain web addresses, such as child pornography, in his, "my favorites" folder, would have to have taken affirmative action to place them there. The witness also examined the hard drives of the three computers seized from the Defendant. From his examination, Agent Price testified that he could determine the times and dates of the computer downloads by Defendant relevant to Count II of the indictment.

There was also a stipulation between the parties that as to Count II, the material was received within the dates charges and within the statute of limitations. Thus, the statute of limitations argument of the Defendant only applies to Count I.

There were certain other stipulations between the parties, including that the images both charged in Counts I and II are images of child pornography and that the approximate number of images listed in each computer in Counts I and II are correct, and that Defendant was in knowing receipt of these materials. (N.T. at 49-50).

Following the government's evidence, the Defendant moved for a directed verdict and rested. (N.T. at 57-58). The

parties thereafter submitted post-trial briefs and the matter is now ready for a decision.

The government contends that the facts proven are sufficient to show that the offenses were committed within the statute of limitations as to Count I. The Defendant disputes that the offense alleged in Count I was proven as committed within the statute of limitations. The Defendant also asserts that the government did not prove the interstate commerce nexus as to both Counts.

As to the statute of limitations issue, the Court finds that the government did not prove beyond a reasonable doubt that the offense charged in Count I of the indictment was committed within the period of the statute of limitations. There is no evidence as to when the material was received, and no evidence from which the Court can make an inference. Thus, the Court will grant the Motion for Judgment of Acquittal as to Count I. As to Count II, there is no dispute that the evidence is sufficient to show that the offense was committed within the statute of limitations.

With regard to interstate commerce, the parties and the Court have not found any Third Circuit case on point. The leading cases on this issue appear to be U.S. v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) and U.S. v. Runyan, 290 F. 3d 223, 249 (5th Cir. 2002), citing other decisions and holding that transmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce for purposes of 18 U.S.C. §2251, as to which the interstate commerce requirement is identical to the statute under which the present indictment is brought. See U.S. v. Kimler,335 F.3d 1132 (10th Cir. 2001) (dictum).

Numerous courts have held that the modern phenomenon of the internet is thoroughly connected to and part of

interstate commerce. See, for example, American Book Sellers Foundation v. Dean, 342 F.3d 96 (2ndCir. 2003), interpreting the, "dormant commerce clause" (which protects against state regulations that erect barriers against interstate trade) and finding that internet usage is thoroughly part of interstate commerce. See, Note, The Dormant Commerce Clause and the Internet,17 Harvard J. L. and Tech, 296 (2003).

The Court holds that the evidence which the government presented, that the images on the Defendant's computers were received through the use of the internet, is sufficient to carry its burden of proof as to interstate commerce, and that it is not necessary to prove that the specific images were received from a source outside of Pennsylvania.

The Defendant asserts that the Supreme Court's decisions in U.S. v. Lopez, 514 U.S. 549 (1995), U.S. v. Morrison,529 U.S. 598 (2000) and Jones v. U.S., 529 U.S. 848 (2000) control, and that the federal jurisdictional requirement, that forbidden images must have been proven to have been transported in interstate commerce, must be interpreted to require the government to prove the passage of child pornography across state lines. Without such proof, Defendant argues only the states may criminalize the receipt of pornography within state lines. However, even after Lopez, the Third Circuit held in U.S. v. Rodia,194 F.3d 465 (3d Cir. 1999), cert. denied 529 U.S. 1131 (2000) that the statue under which Defendant is being prosecuted was a constitutional exercise of Congress' commerce clause power. This Court is bound by the holding in Rodia and therefore rejects Defendant's reliance on Lopez and its progeny. [2]

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[2] Cf. U.S. v. Maxwell, 386 F.3d 1042 (11th Cir. 2004) suggesting that Morrison requires reexamination of the holding in Rodia.

3) Constitutional Provisions Involved:

a) Article I, §8 of the Constitution of the United States:

The Congress shall have the power

* * *

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

b) Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

c) Amendment VIII to the Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4) Statutes Involved:

a) 18 U.S.C. §2252, in part:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * *

shall be punished as provided in subsection (b) of this section.

b) 18 U.S.C. §2252A, in part:

(a) Any person who–

* * *

(2) knowingly receives or distributes–

* * *

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

* * *

shall be punished as provided in subsection (b).

* * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.